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V

War Crimes

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THE BIBLE IS REPLETE WITH EXAMPLES of what today we would consider to be war crimes against humanity, but which in Biblical days were common and accepted acts of war. Many statements similar to the following will be found in the Bible:

> Thus we put to death all the men, women, and dependents in every city, as we did to Sihon King of Heshbon. All the cattle and spoil from the cities we took as booty for ourselves.[1]

> You shall put all its males to the sword, but you may take the women, the dependents, and the cattle for yourselves, and plunder everything else in the city.[2]

That such actions were typical of the time demonstrates the distance that constraints on war have traveled over the past two millenia.

Probably one of the earliest war crimes trials of which we have knowledge is the so-called "Breisach Trial," the trial of Peter von Hagenbach by a multinational tribunal in 1474. An area of the Upper Rhine, including the town of Breisach, was pledged to the Duke of Burgundy by the Archduke of Austria to guarantee a debt. As the Military Governor appointed by the Duke

of Burgundy, von Hagenbach instituted a brutal policy that included "murder, rape, illegal taxation and wanton confiscation of private property" against the citizens of Breisach and of the surrounding area. Eventually, von Hagenbach was seized by revolting German mercenaries and the citizens of Breisach and tried by a tribunal consisting of twenty-eight judges, eight from Breisach and two from each of the other Alsatian, German, and Swiss towns affected. His defense was "superior orders"—that he was merely complying with the orders of his master, the Duke of Burgundy. He was found guilty, deprived of his knighthood, and executed. Although his acts had been committed before the actual outbreak of war, the occupation of Breisach resembled a wartime occupation, and his offenses would now be considered to have been war crimes.[3]

There were, undoubtedly, war crimes trials conducted in the succeeding centuries,[4] but we find little documentation in that regard. However, in *De Jure Belli Ac Pacis Libri Tres*, published in 1625, Hugo Grotius said:

> The fact must be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.[5]

In effect, Grotius was saying that any sovereign had the right to try violators of the law of war even though neither he nor his subjects were the victims of the illegal act—the doctrine of universal jurisdiction over war crimes.[6]

During the American Civil War (1861-1865), the so-called Lieber Code, issued by the Union Army in 1863 as General Orders No. 100, contained the following provision:

> 59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.[7]

After the war's end, the Federal authorities tried a number of former Confederates for war crimes committed during the hostilities.[8]

Several decades later, during the Philippines "pacification" program that followed the Spanish-American War (1898), war crimes were committed by both sides. The United States Army tried not only guerrillas who had violated the law of war,[9] but also members of its own Army who had done likewise.[10]

In and after the Boer War (1899-1902), the British army tried several war crimes cases, cases involving both its own personnel and personnel of the enemy. The 1902 Treaty of Vereeniging, which ended that conflict, provided:

> IV. No proceedings, civil or criminal, will be taken against any of the burghers so surrendering or so returning for any acts in connection with the prosecution of the war. *The benefits of this clause will not extend to certain acts contrary to the usage of war which have been notified by the Commander-in-Chief to the Boer generals and which shall be tried by court-martial immediately after the close of hostilities.*[11]

While hostilities were ongoing, the British tried three Australian officers of its army for war crimes; after the war, a Boer who had misused a white flag was tried.

During World War I (1914-1918), violations of the law of war, war crimes, were committed and trials were conducted by both sides. One case which caused a furor in Great Britain was the trial, conviction, and execution by Germany of Charles Fryatt, captain of the British merchant vessel S.S. *Brussels*. At the outbreak of the war the British Admiralty had instructed all merchant captains that if approached by a German submarine on the surface, they were to try to ram it. This happened to Captain Fryatt, who saved his ship by attempting to ram the submarine which was then forced to depart. A year later the *Brussels* was captured by German surface vessels. Captain Fryatt was tried as having been an illegal combatant. His defense was that he had obeyed the order of his government. He was convicted and executed. At the time, the British termed this "judicial murder." As we shall see, the decision of the German court is now accepted international law.

One article of the Treaty of Versailles, which ended World War I, provided for the trial of the ex-Kaiser of Germany by an international court "for a supreme offense against international morality and the sanctity of treaties."[12] Today, we would probably designate that offense as falling within the term "Crimes against Peace." He was never tried because he had sought and obtained asylum in The Netherlands, which refused to extradite him despite demands by both France and the United Kingdom. The Treaty also provided for the surrender, to the former Allies for trial, of individuals alleged to have committed war crimes during the course of the hostilities. For political reasons, the Allies eventually agreed that such trials should be conducted by the Supreme Court of Leipzig.[13] After a dozen cases had been tried at the behest of Belgium, France, and the United Kingdom, most of which resulted in either unwarranted acquittals or grossly inadequate sentences, the Allies ceased sending cases to the German court. This experience demonstrated that the

trial by enemy courts of war crimes allegedly committed by members of the enemy armed forces or civilian population against members of the armed forces, civilian population, or property of the victors was not a viable solution to the problem, and that more just results could be obtained in the courts of the victors.[14]

There were, however, two cases tried by the Supreme Court of Leipzig which are worthy of mention. Believing that the British were using their hospital ships, normally exempt from attack, for military purposes, the German Admiralty announced that such vessels must follow certain prescribed routes; if they were found in a barred route, they would be subject to attack. Finding the British hospital ship *Dover Castle* outside the prescribed routes, a German submarine sank it without warning. When the submarine commander was tried by the Supreme Court of Leipzig, his defense was that he had complied with the orders of his Government and his superiors. Despite the decision in the *Fryatt Case*, which had held that compliance with an order of one's government was no defense, he was acquitted.[15]

The second case of interest also involved a British hospital ship, the *Llandovery Castle*. While sailing across the Atlantic from Canada to Great Britain, it was sighted by a German submarine. For some unknown reason, the German submarine commander decided that it was carrying American aviators and torpedoed it. When survivors in life boats were interrogated, it became clear that the only persons who had been aboard were Canadian medical personnel and the crew. In order to cover up his crime, the German captain and two of his officers proceeded to machine-gun the lifeboats. One lifeboat escaped destruction and so the incident became known. At the end of the war, the captain disappeared, but his two officers were brought to trial. Their defense was "superior orders." In this case, the Court held that while compliance with the orders of a superior was normally a good defense, that was not so where, as here, "the order is universally known to everybody, including the accused, to be without any doubt whatever against the law." The accused were found to be guilty of a war crime.[16]

In 1928, the "Pact of Paris," also known as the "Kellogg-Briand Pact" after its progenitors, and technically known as the International Treaty for the Renunciation of War as an Instrument of National Policy, was drafted. It was accepted by forty-four States, including all of the then-major Powers except the Soviet Union. This Pact provided:

> Article 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of

international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means.[17]

During the course of World War II numerous statements were made by the members of the Allied Powers to the effect that upon the conclusion of hostilities there would be trials of those who had violated the law of war, including those who were responsible for the initiation of the war. Then, on 13 January 1942, nine of the countries at war with Germany signed the Declaration of St. James.[18] The relevant provisions of that Declaration stated the signatories:

Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, does not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force, or to overthrow national institutions,

(1) affirm that acts of violence thus inflicted on the civilian populations have nothing in common with the conception of an act of war or a political crime as understood by civilised nations,

. . .

(3) place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.[19]

In addition, numerous official pronouncements to the same general effect were made by individual countries and by the Heads of State.[20] On 20 October 1943, a conference at the British Foreign Office resulted in the establishment of the United Nations Commission for the Investigation of War Crimes (this title was later changed to the United Nations War Crimes Commission); with the exception of the Soviet Union, all of the European Allies, and China were represented.[21]

Germany surrendered in May 1945, but even before then discussions had been entered into concerning the manner in which the punishment of the European war criminals was to be accomplished. From the beginning, the United States favored trials for all alleged war criminals, including the leaders.

The Soviet Union also favored a judicial solution to the problem. The United Kingdom originally favored a political solution for the leaders, citing the difficulties of a trial by an international court, but ultimately agreed to a trial. At the Yalta Conference in February 1945, the decision was made that there would be a trial. The following May, at the organizing meeting for the United Nations in San Francisco, the United States circulated a draft proposal for such a trial to the representatives of the Provisional Government of France, the Soviet Union, and the United Kingdom. Supreme Court Associate Justice Robert Jackson was named as Chief Counsel for the United States by President Truman and immediately began conferring with all concerned. On 25 June 1945 a conference of the four major Powers opened in London. They signed an Agreement to which was attached a Charter of the International Military Tribunal (IMT) on 8 August 1945.[22] Justice Jackson had offered Nuremberg, in the American Zone of Occupation, as a suitable place for the trial and this offer was accepted.[23]

The Charter of the International Military Tribunal listed the offenses within its jurisdiction, some of which were later alleged to be *ex post facto*. The offenses listed were: (1) crimes against peace; (2) war crimes; (3) crimes against humanity; (4) conspiracy to commit any of the foregoing; and (5) membership by the accused in an organization determined to be criminal. There was no provision for appeal, the decision of the Tribunal being final.

Two other provisions of the Charter of the IMT are worthy of mention. First, contrary to prior general custom, but in accordance with the provision of the Treaty of Versailles for the trial of the ex-Kaiser, the Charter provided:

> Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Second, following the decision of the German court in the case of Captain Charles Fryatt, the Charter provided:

> Article 8. The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[24]

The International Military Tribunal consisted of one judge and one alternate from each of the four countries. With each State participant having a Chief Counsel of equal rank, the prosecution could only act by agreement. After some difficulties, twenty-four individuals were indicted[25] and, on 18

October 1945, arraigned in Berlin. The trial itself took place at Nuremberg from 30 November 1945 to 31 August 1946, with judgment delivered on 1 November 1946. Twelve accused received death sentences; three received sentences to imprisonment for life; four received sentences to imprisonment for specified terms; and three were acquitted.[26] The decision of the Tribunal was unanimous except that the Soviet judge dissented from the acquittals, the failure to adjudge the death sentence against Rudolph Hess, and the findings that several organizations were not criminal in nature.[27]

It was argued that "crimes against peace" had not been an international offense and that, therefore, it was improper to charge the accused with this offense. The Tribunal found that, in view of the Kellogg-Briand Pact, the making of aggressive war was a war crime which had existed before the outbreak of World War II and that the accused could, therefore, be guilty of the offense of having committed a crime against peace.[28]

When the Tribunal found that several of the Nazi organizations, such as the SS, the SD, and the Gestapo, were criminal in nature, that meant that every member of that organization was guilty of a war crime unless he could prove that he had not known of its criminal nature when he joined it and that he personally had never participated in its criminal activities. Inasmuch as the membership in these organizations numbered in the tens of thousands, the task of trying them was obviously beyond the resources of the Allied Powers. Accordingly, this chore was turned over to the German courts, which tried many thousands of these cases.[29]

The trial by the International Military Tribunal was only the tip of the iceberg. The Allied Control Council, the central authority for the four zones of occupation, enacted a law intended to bring some uniformity into the war crimes prosecution programs of the four zones of occupation of Germany. The Military Governor of the United States Zone of Occupation promulgated an implementing law. Under this law, the United States tried twelve cases, known colloquially as the "Subsequent Proceedings," involving 185 high-ranking government, military, and industrial personnel (of whom 35 were acquitted and 24 received death sentences);[30] and, under general international law, United States military commissions sitting in Dachau (a former Nazi concentration camp) tried 1,062 accused (of whom 256 were acquitted and 426 received death sentences).[31] The last two World War II war crimes trials conducted in Europe were both tried in French courts. In 1987, Klaus Barbie, who had been the head of the Gestapo in Lyons during the war and who was responsible for many deportations of Jews and executions, was deported from

Bolivia where he had taken refuge and where a previous government had denied extradition. He was convicted of crimes against humanity and sentenced to imprisonment for life. (He died in prison in 1991.) Then, in 1994, Paul Touvier, a Frenchman who had headed a branch of the Milice, the French police organization which supported (and sometimes outdid!) the Nazi Gestapo, and who had remained hidden in France for all those years, was tried for the execution of seven Jews in retaliation for the assassination of Philippe Henriot, a rabid pro-Nazi Frenchman. (It was not alleged that the Jewish victims had any connection with the assassination.) Touvier was found guilty of a crime against humanity and sentenced to life imprisonment.

Meanwhile, somewhat similar war crimes trials programs were being conducted in the Far East. An International Military Tribunal for the Far East had been established by a proclamation issued by General Douglas MacArthur, the Supreme Commander for the Allied Powers. Its Charter was very much similar to that of the International Military Tribunal except that it consisted of eleven judges (one from each of the countries which had signed the Japanese surrender agreement and one each from India and the Philippines), and General MacArthur retained a right of review. Moreover, there was only one chief prosecutor (an American) and an assistant prosector from each of the other participating countries. The main question was whether the Emperor would be named as an accused. It was finally decided that he would not be among the accused, primarily because such action would have made the occupation so much more difficult because of the regard in which he was held by the Japanese people. There were originally twenty-eight accused, but two died during the trial and one was found to be incompetent to stand trial. The accused were arraigned in Tokyo on 3-4 May 1946, and the trial proper ran from 3 June 1946 until 16 April 1948. The reading of the judgment did not begin until 4 November 1948 and ended on 12 November. In addition to the judgment of the Tribunal, there was one separate opinion, one concurring opinion, and three dissenting opinions. There were seven death sentences,[32] sixteen sentences to imprisonment for life, one to imprisonment for twenty years, and one to imprisonment for seven years.[33]

Here, too, there was a multitude of trials by military commissions. The United States tried cases in Manila, Yokohama, Kwajalein, Guam, and China. Additionally, the United Kingdom, France, China, Australia, the Netherlands East India, and the Soviet Union all tried war crimes cases in the Far East.[34]

As would be expected, in addition to the claim of *ex post facto*, there were a number of legal problems presented in the prosecution of all of these war crimes. Probably the provision which caused the most dispute was that relating

to the receipt of evidence. Article 19 of the Charter of the International Military Tribunal stated:

> The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

The charters for the other Tribunals and military commissions all had identical or similar provisions. American lawyers, accustomed to the stringent technical rules of evidence applicable in the common law system, often argued that this was unfair to the accused. They overlooked the facts that civil law countries, which do not have these technical rules of evidence, were equally involved and that the circumstances of war crimes trials are such that victims and witnesses may be thousands of miles away in their home countries by the time of trial. Accordingly, the full application of the common law rules of evidence would have made many trials impossible. In order to ensure fairness, the Tribunal adopted the rule that affidavits would be admissible, but that the opposing party could challenge the affidavit and demand the production of the affiant as a live witness. Strange to relate, in the only statistics available on the subject, in the first seven trials of the "Subsequent Proceedings," the prosecution offered 291 affidavits while the defense offered 3,098. The prosecution challenged 40 of the defense affidavits while the defense challenged 84 of the prosecution affidavits (64 of the latter challenges were in one case!).[35]

When the Secretary-General of the United Nations drafted a proposed Statute for an International Tribunal for the Prosecution of Persons for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, a Statute that was approved without change by the Security Council, Article 15 thereof provided that the Judges of the Tribunal could adopt rules for the admission of evidence.[36] The Judges of the International Tribunal adopted Rule 89(C), which provides that "A Chamber may admit any relevant evidence which it deems to have probative value;" and Rule 89(D) which provides that "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."[37]

The fact that the action charged as a war crime had been performed pursuant to the order of a superior was advanced in almost every case. Frequently the evidence established the validity of the claim. Under Article 8 of the Charter, quoted above, and its equivalent in other war crimes laws and regulations, this was not a defense. However, in such cases where the accused

was found to be guilty, his sentence would frequently be considerably mitigated.

When the International Law Commission formulated the principles of the Charter and judgment of the IMT, its Principles 3 and 4 paralleled Articles 7 and 8 of the Charter. Nevertheless, in every case where the denial of the defense of "superior orders" has been proposed for inclusion in law of war conventions drafted since World War II, the proposal has been rejected.[38] However, the Secretary-General did include such a provision denying the "defense" in the Statutes he prepared for the International Tribunals for the Former Yugoslavia and for Rwanda, and the Security Council retained them.[39] Similarly, the Code of Conduct on Politico-Military Aspects of Security, adopted by the Conference on Security and Cooperation in Europe, includes the following provisions:

> 30. Each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that *they are individually accountable under national and international law for their actions.*
>
> 31. The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given. *The responsibility of superiors does not exempt subordinates from any of their individual responsibilities.*[40]

The responsibility of the commander for the issuance of illegal orders and for violations of the law of war by his subordinates has also been a major problem. This question arose early in the war crimes program after World War II when Japanese General Tomoyuki Yamashita was tried in Manila in October 1945, charged with the responsibility for innumerable violations of the law of war committed by his troops during the battles for the recovery of the Philippine Islands by the United States. His defense was that he took no action to terminate these war crimes and punish the offenders, because he was unaware of the fact that they were being committed. What the military commission which tried him, and the boards and courts which reviewed the case on appeal, held was, in effect, that when a commander *knew, or should have known*, that troops under his command were committing war crimes, he had a duty to end such actions and to punish the perpetrators.[41]

The responsibilities of the commander for violations of the 1949 Geneva Convention[42] and of the 1977 Additional Protocol I[43] are now set forth in Articles 86(2) and 87 of the latter. They provide:

> Article 86. Failure to act
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> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
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> Article 87. Duty of Commanders
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> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
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> 3. The High Contracting Parties and the Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

The International Tribunal for the Former Yugoslavia, mentioned above, was the first tribunal for the trial of war crimes not established by the victor or victors. Its judges are elected by the United Nations. Composed of two Trial Chambers of three judges each and an Appeals Chamber of five judges, it is the first war crimes court in which there is a right of appeal. In the *Tadic Case,* the accused challenged the jurisdiction of the Tribunal, but the Appeals Chamber determined that it was properly established and did have jurisdiction to try cases involving violations of the law of war which had occurred in the former

Yugoslavia. At the time of this writing, although the International Tribunal for the Former Yugoslavia has now been in existence for four years, it has tried only two cases. In the *Erdemovic Case* there was a guilty plea. (The defendant has filed an appeal based on the ground that his ten-year sentence is too severe!) In 1997, the Appeals Chamber decided the *Tadic Case* on the merits, convicting the accused.

In 1994 the United Nations Security Council adopted Resolution 955 establishing a similar Tribunal to try genocide and other war crimes committed in Rwanda or in neighboring States by Rwandan citizens. The Statute for this Tribunal is identical, *mutatis mutandis*, to that of the Tribunal for the Former Yugoslavia. The Appeals Chamber already established will function for both Tribunals.

For many years the International Law Commission has been charged with the task of drafting a Statute for an International Criminal Court. In a Draft Statute prepared in 1993, the jurisdiction of the Court included, among others, the crimes of genocide and grave breaches of the four 1949 Geneva Conventions and 1977 Additional Protocol I.[44] It would also have jurisdiction over crimes of aggression where the Security Council of the United Nations "has first determined that the State concerned has committed the act of aggression which is the subject of the charge."[45] The Draft Statute is still in an embryonic stage. It was the subject of the work of a preparatory committee and, unless there are developments to the contrary, a diplomatic conference will be convened in 1998 to draft a convention establishing an international criminal court.[46]

The most recent action of the United States in this area occurred on 21 August 1996 when the President approved the "War Crimes Act of 1996."[47] It provides:

> §2401. War crimes
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> (a) OFFENSE. Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
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> (b) CIRCUMSTANCES. The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

> (c) DEFINITIONS. As used in this section, the term "grave breach of the Geneva Conventions" means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

Heretofore, when a nation tried one of its own personnel for a violation of the law of war such as a grave breach of one of the 1949 Geneva Conventions, as in the *Calley Case*, it has not been considered to be a war crimes case, although, in fact, that was what it was. Insofar as the United States is concerned, such a trial will, in the future, unquestionably be a war crimes case. Apparently, Congress did not consider it necessary to include the commission of such offenses by non-nationals of the United States, whether committed against American or foreign personnel. There can be no doubt that they are already war crimes within the jurisdiction of the United States.

On 19 October 1996, the President approved an Act which includes the following provision:

> § 2. Sense of The Congress.
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> It is the sense of the Congress that United States Government agencies in possession of records about individuals who are alleged to have committed Nazi war crimes should make these records public.[48]

This Act was considered necessary because of the overly strict construction that many government agencies are following in application of the Freedom of Information Act.

The laws against war crimes, like all penal laws, have two purposes: 1) to discourage their commission; and 2) to punish offenders. During the past half-century the international community has failed in both of these areas. The rare possibility of trial after the termination of hostilities does not greatly discourage the commission of further offenses during the course of hostilities; the complete failure to punish individuals for the commission of war crimes even after the termination of hostilities certainly does not discourage their commission in the next conflict that occurs.[49] It remains to be seen whether the action of the Security Council of the United Nations in the Former Yugoslavia and in Rwanda, and the possible creation of an International Criminal Court, will have any lasting effect.[50]

Notes

1. *Deuteronomy* 4:6-7.

2. *Id.* at 20:14. *See also Numbers* 31:7-12; 1 *Samuel* 15:3; etc. For similar as well as contrary rules in other civilizations, see the Introduction to 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 3 (Leon Friedman ed., 1972).

3. 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW (ARMED CONFLICT) 462-466 (1968).

4. The same author lists several events which might be considered to be war crimes trials in earlier years in Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947).

5. Vol. II (Classics of International Law, Francis W. Kelsey trans., 1984), at 504.

6. The Treaty of Westphalia, 1 Consol. T.S. 319, 1 MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, at 7 (Fred L. Israel ed., 1967), which ended the Thirty Years' War in 1648, included the following provision:

> II
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> That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such a manner, that nobody, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any trouble to each other; . . . That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolished in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.

This certainly appears to be a recognition and waiver by both sides of the violations of the law of war committed by the other.

7. THE LAWS OF ARMED CONFLICT 3, 12 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988)

8. United States v. Henry Wirz, 8 Amer. St. Trials 657 (1918) (Wirz was charged with maltreatment of Union prisoners of war in the Andersonville, Georgia, prisoner-of-war camp. He was convicted and executed); U.S. v. James W. Duncan, MILITARY LAW AND PRECEDENTS 791-792 (William Winthrop ed., 1886; 2d ed. 1920) (Duncan was one of Wirz's civilian assistants. He was convicted and sentenced to imprisonment for fifteen years); U.S. v. Major John H. Gee, *id.* at 792 n. 28 (He was tried for the maltreatment of Union prisoners of war at another Confederate prisoner-of-war camp. He was acquitted); United States v. T.E. Hogg et al., 8 RECORDS OF THE REBELLION, Series II, 674 (Several members of the Confederate armed forces boarded an American merchant vessel in civilian clothes with the intention of taking it over and using it as a Confederate commerce raider. They were convicted and sentenced to death, but their sentences were commuted to imprisonment); etc.

9. U.S. v. Braganza et al., *cited in* Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 211 (1945); U.S. v. Versosa et al., *id.* at 210; etc.

10. U.S. v. Brig. Gen. Jacob A. Smith, *reprinted in* Friedman, *supra* note 2, at 799; U.S. v. Major Edwin F. Glenn, *reprinted in id.* at 814; United States v. Lt. Preston Brown, *reprinted in id.* at 820; etc.

11. 2 Israel, *supra* note 6, at 1145, 1146 (emphasis added).

12. 2 T.I.A.S., at 43, 136 (Charles Bevans ed., 1969); 13 AM. J. INT'L L. (Supp.) 151 (1919).

13. The Allies had originally submitted a list of about 890 names of individuals wanted for trial, including the Crown Prince, General von Hindenburg, Admiral von Tirpitz, and many other former leaders of Germany. The list submitted to the Supreme Court of Leipzig contained only 45 names.

14. One of the most vehement opponents of this conclusion was himself *tried and acquitted* in the so-called I.G. Farben Case (U.S. v. Carl Krauch). *See* VON KNIERIEM, THE NUREMBERG TRIALS (1959). The fairness of the trial was rarely an issue raised by the accused. The one case in which this might be said to have become a major issue was *In re* Yamashita, 327 U.S. 1 (1946), discussed below.

15. 16 AM. J. INT'L L. 704 (1922), 2 ANN. DIG. 429 (1922). This decision was probably based upon a finding that, under the circumstances, the order of the German Admiralty was a legal order.

16. 16 AM. J. INT'L L. 708 (1922); 2 ANN. DIG. 436 (1922).

17. 46 Stat. 2343, 94 L.N.T.S. 57, 22 AM. J. INT'L L. (Supp.) 171 (1928), 128 B.F.S.P. 447.

18. The group which initiated this action was then known as the Inter-Allied Conference on the Punishment of War Crimes. The name was later changed to the Inter-Allied Commission on the Punishment of War Crimes.

19. It is reproduced in THE HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 90 (1948).

20. The most important of these Declarations was probably that made at Moscow by Prime Minister Churchill, President Roosevelt, and Marshal Stalin in November 1943. *Id.* at 107.

21. The Soviet Union was not represented because it had demanded that seven of its constituent Republics, which were actively engaged in the war, each be represented, a demand which had not been met. *Id.* at 112. The United Nations War Crimes Commission functioned until 1948, receiving trial records from its member nations, many of which were published with a discussion of the applicable law in a 15-volume set of books, UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947-49).

22. Nineteen other nations subsequently adhered to the London Agreement.

23. The history of the negotiations that culminated in the 1945 London Agreement and the Charter of the International Military Tribunal is recorded in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, Department of State Publication 3080 (1949).

24. 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1240. The comparable provisions of the Charter of the International Military Tribunal for the Far East state:

> Article 7. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime for which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

T.I.A.S. 1589, 4 Bevans 27. It will be noted that here, unlike the London Charter, the fact that the accused complied with an order of his Government may be considered in mitigation of punishment.

25. One accused was found to be incompetent, another committed suicide, and a third, Martin Bormann, was tried *in absentia*, so there were actually twenty-one accused present in Court. (Although Bormann was not present in Court, he was represented by defense counsel.)

26. The three who were acquitted soon found themselves facing German courts, where all three were convicted of having violated German law!

27. One accused, Hermann Goering, committed suicide before he could be hung. He and those who were executed were all cremated and their ashes spread to the winds. With the exception of Hess, the others, including those with life sentences, either died or were released prior to the expiration of their sentences. The Soviet Union refused to agree to Hess' release. When he died (or committed suicide) in 1987, he was the only major war criminal still imprisoned in Spandau Prison in Berlin.

28. After years of debate in the League of Nations and in the United Nations, in 1974 the General Assembly of the United Nations adopted a resolution in which one paragraph specifically provides that "A war of aggression is a crime against international law." G.A. Res. 3314 (XXIX), Dec. 14, 1974, 13 I.L.M. 710, 714 (1974).

29. The Allied authorities considered that by assigning the task to the German courts, they would determine the extent of their de-Nazification. Since these cases were, for the most part, trials of Germans for offenses committed against other Germans, they were not then considered to be war crimes trials.

30. Each of these twelve trials was conducted by three American judges, usually borrowed from state courts. The I.G. Farben Case, referred to *supra*, in note 14 was Case No. 6 of these cases.

31. The great majority of these cases fell into three categories: lynching of downed Allied airmen, concentration camp personnel, and acts of euthanasia. During this period, the British tried 1,085 accused in their zone, of whom 348 were acquitted and 240 received the death sentence; France tried 2,107 accused, of whom 404 were acquitted and 104 received death sentences; and the Soviet Union tried 14,240 accused of whom 142 were acquitted and 138 received death sentences. (The statistics provided by the Soviet Union are not generally accepted. There were 66 death sentences in just 9 cases recorded by the United Nations War Crimes Commission. United Nations Archives, UNWCC, Reel 36.)

32. Unlike the procedure followed in Germany, the ashes of the individuals who were sentenced to death were preserved and are now buried in what is considered to be a shrine!

33. The individual who received the seven year sentence was Maroru Shigemitsu. Like the others, he received an early release from confinement and four years later he was the Foreign Minister of Japan!

34. Strange to relate, although the Soviet Union was in the war for less than a week, it tried several thousand war crimes cases and still held Japanese as war crimes prisoners in 1955, long after all the other countries had caused the release of their prisoners.

35. HOWARD LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 260 n.131 (1994).

36. U.N.Doc. S/25704, May 1, 1993, 32 I.L.M. 1192, 1196 (1993).

37. U.N. Doc. IT/32, March 14, 1994, 33 I.L.M. 484, 533 (1994).

38. *See* Howard Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 184 (1991), *reprinted in* LEVIE ON THE LAW OF WAR (Michael N. Schmitt & Leslie C. Green eds., 1998) [forthcoming]. Many nations have provisions in their civil penal law that make compliance with

the orders of a superior a defense. This is probably a major reason for their objection to denying it to the military. Moreover, the national representatives at Diplomatic Conferences probably fear, with reason, that military discipline would be adversely affected, as it might cause a subordinate to refuse to obey an order that is legitimate but which the subordinate *believes* to be illegal.

39. The provisions of the Statute for the International Tribunal for the Former Yugoslavia frequently follow the London Charter. Thus, its Article 7 states:

> **Article 7: Individual Criminal Responsibilities**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that anyone of the acts referred to in articles 2 to 5 of the present statute were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment, if the International Tribunal determines that justice so requires.

40. 12 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 7, 11 (Howard Levie ed., 1997).

41. This case ultimately reached the United States Supreme Court which, in *In re* Yamashita, 327 U.S. 1 (1946), sustained the conviction by a vote of six to two.

42. 1949 Geneva Conventions relative to the Protection of Victims of War, 6 U.S.T. 3114/3217/3316/3516, T.I.A.S. Nos. 3362/3363/3364/3365, 75 U.N.T.S. 31/85/135/287, 157 B.F.S.P. 234/262/284/355.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 72 AM. J. INT'L L. 457 (1978); 16 I.L.M. 1391 (1977). To date the United States has not ratified this Protocol.

44. U.N. GAOR, 48th Sess., Supp. No. 10 (A48/10), at 255 (1993), 33 I.L.M. 253 (1994) (art. 22, at 264; art. 23, at 268; and art. 26 at 268). The Commission has also long engaged in the task of preparing a Draft Code of Crimes Against the Peace and Security of Mankind. Article 20 of the 1996 draft, entitled "War Crimes," is quite complete in its coverage of both customary and conventional war crimes. U.N. GAOR, 51st Sess., Supp No. 19, U.N.Doc. A/51/10 (1996); 91 AM. J. INT'L L. 365, 369 (1997).

45. Art. 27, 33 I.L.M. 270 (1994). The overall provisions proposed for jurisdiction are far from satisfactory.

46. G.A. Res. 51/207, Dec. 17, 1996, 36 I.L.M. 510 (1997). Much as he favors the establishment of such a Court, the present writer is not optimistic that States, particularly the United States, will ratify such a Convention.

47. Pub. L. No. 104-192, 110 Stat. 2104, 18 U.S.C. 2401.

48. Pub. L. No. 104-309, 110 Stat. 3815.

49. The United Nations Command was prepared to try about 200 individuals for war crimes committed during the Korean War (1950-1953). No trials took place because of the provisions of the Armistice Agreement requiring the repatriation of any prisoner of war who so desired. During the conflict in Vietnam, the United States tried a number of its own personnel [*see* United States v. Calley, 46 CMR 1131 (1973), *aff'd* 48 CMR 19 (1973), habeas corpus granted, 382 F. Supp. 650 (1974), *rev'd* 519 F. 2d 184 (1975), *cert. den.* 425 U.S. 911 (1976)]. *See also* GARY I. SOLIS, SON THANG: AN AMERICAN WAR CRIME (1997). It tried none of the enemy despite criminal acts such as the shooting of two innocent American prisoners of war as a reprisal for the trial and execution by the South Vietnamese of a terrorist bomber caught in the act.

50. In Kadic v. Karadzic, 70 F. 3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2542 (1996) 34 I.L.M. 1595 (1995), the United States Circuit Court, Second Circuit, held that under the Alien Tort Act of 1789 and the Torture Victim Protection Act of 1991 [106 Stat. 73 (1992), 28 U.S.C. 1350 note (Supp. V, 1993)], civil suit could be brought in United States Courts against the perpetrators of genocide, war crimes, and crimes against humanity in foreign countries by the victims or their representatives where service of process was accomplished in the United States.